COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2014-SC-000008-D
(2012-CA-941-MR)

SAINT JOSEPH HEALTHCARE, INC.
d/b/a SAINT JOSEPH HOSPITAL — APPELLANT

v.

On Appeal from Fayette Circuit Court
Hon. Pamela R. Goodwine, Judge
Civil Action No. 00-CI-1364

LARRY O'NEIL THOMAS, as Administrator of the
Estate of JAMES "MILFORD" GRAY, deceased, and
all lawful survivors of JAMES "MILFORD" GRAY, deceased — APPELLEES

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BRIEF OF APPELLEES

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of this Brief has been served by U.S. mail upon the following parties on this the 9th day of January, 2015: Robert F. Duncan and Jay E. Ingle, Jackson Kelly PLLC, 175 East Main Street, Suite 500, Lexington, KY 40507; Darryl L. Lewis, Searcy, Denney, Scarola, Barnhart & Shipley, PA, P.O. Drawer 3626, West Palm Beach, FL 33402-3626; Charles A. Grundy, Jr., Grundy Law Group, 3270 Blazer Parkway, Suite 102, Lexington KY 40509; William R. Garmer, Garmer & Prather, PLLC, 141 North Broadway, Lexington, KY 40507; Hon. Pamela R. Goodwine, Fayette Circuit Court, Robert F. Stephens Courthouse, 120 North Limestone, Lexington, KY 40507, and Samuel P. Givens, Jr., Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.

ELIZABETH R. SEIF

COUNTERSTATEMENT CONCERNING ORAL ARGUMENT

The appellees, Larry O'Neil Thomas, as administrator of the estate of James "Milford" Gray, deceased, and all lawful survivors of James "Milford" Gray, deceased ("Thomas"), agree with the appellant, Saint Joseph Healthcare, Inc. d/b/a Saint Joseph Hospital ("the Hospital"), that this case has been long and complicated, but at this stage there remain only a few issues that this Court need decide. Nevertheless, Thomas believes that oral argument may be useful to the Court because the Court may have questions about factual matters that have not been adequately presented in the parties' briefs.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Thomas does not accept the Hospital's Statement of the Case, and instead submits the following:

James Milford Gray, a paraplegic 39-year-old, came to the Hospital on April 8, 1999 seeking treatment for abdominal pain, constipation for four days, nausea, and vomiting. This appeal arose from the Hospital's violation of the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd ("EMTALA", the "anti-dumping statute") and grossly negligent care of Mr. Gray on April 8, 1999 and April 9, 1999, which caused severe pain and resulted in his death from untreated purulent peritonitis—an inflammation of the lining of the abdominal cavity with pus, due to an ulcer of the duodenum that eroded through the duodenum's wall (Dr. James Hunsaker, 22-4-12-cd=24-11, 3:19:42)—on April 9, 1999, about four hours after he was sent home by the Hospital and told that the police would be called if he returned. The Hospital twice discharged Mr. Gray from its emergency department in a period of about 16 hours, after determining that he had an emergency medical condition as that term is defined by EMTALA, without stabilizing him as required by EMTALA.

While Mr. Gray was in the Hospital on April 8, another patient, who knew him, heard him crying, calling out for help, and saying he was having severe stomach pain and wanted somebody to come help him. (Michael Scott, 22-4-12-cd=24-8, 11:51:01.) The medical records also contain multiple references to complaints of pain. A radiology technician who took x-rays of Mr. Gray on April 8 observed him moaning, groaning, and breathing heavily in quick, short breaths, and Mr. Gray told him his stomach was hurting

pretty bad. Each time the technician moved or touched Mr. Gray, he would flinch or express pain verbally or through groans or moans. Mr. Gray was in significant pain; they had trouble getting the x-rays because he was in such pain. (Darren Cole, 22-4-12-cd=24-8, 1:27:55.) Late on the night of April 8, Mr. Gray's niece saw him when he was brought by ambulance to her home. He did not look well at all, he looked sick. His skin was ashy gray looking, his lips were white, and he was moaning like he was in pain. (Chesity Roberts, 22-4-12-cd=24-10, 11:19:21.) The niece did not feel he should stay with her because of his ill appearance and he was taken back to the Hospital, which, however, gave no consideration to examining, treating, or admitting him but rather wheeled him across the street to the Kentucky Inn and left him there with no wheelchair. On the morning of April 9, Mr. Gray was taken by ambulance from the Kentucky Inn back to the Hospital after vomiting all night. (Records of Kentucky Inn.) On April 9 after being discharged from the Hospital again, Mr. Gray was taken to his sister Wilma Thomas's house. Ms. Thomas told another sister, Betty Hughes, that Mr. Gray was there and there was something black, that stank, coming out of his mouth, and that the medicine he took with just a little water came back up. (Betty Hughes, 22-4-12-cd=24-8, 1:59:47.) Ms. Hughes went there and saw Mr. Gray. She asked him if he wanted to go back to the Hospital and he said no, they'd already mistreated him enough and had told him that if he went back there, they were going to have him arrested. (*Id.* at 2:00:36.) She saw that he looked gray and appeared cold. (*Id.* at 2:03:00.) He then was taken to his niece's home where he had been staying; the niece testified that he looked the same as he had in the ambulance the night before; he was ashy-looking, had dry lips, and was

moaning in pain and throwing up more. (Chesity Roberts, 22-4-12-cd=24-10, 11:27:11.) He died there about four hours after being discharged from the Hospital. Additional facts are set out as needed in the Argument.

A 2005 trial resulted in a verdict for Thomas on both the EMTALA and medical negligence claims, with a compensatory damages award of $25,000, apportioned 25% to Thomas, 30% to Dr. Parsley, 30% to Dr. Geren,[1] and 15% to the Hospital, and a punitive damages award solely against the Hospital of $1,500,000. An appeal resulted in a remand for a new trial solely on the issue of the award of punitive damages, which the Court of Appeals felt was unconstitutionally excessive in the context of jury instructions that were improper in that they did not set out all the factors that the jury should consider in determining the amount to award if it decided to award punitive damages, did not contain the "clear and convincing evidence" standard, and did not require the jury to find that the Hospital should have anticipated or had authorized or ratified the conduct in order to award punitive damages against the Hospital. *See* Opinion Affirming in Part, Reversing in Part, and Remanding entered by the Court of Appeals on December 5, 2008 ("2008 Opinion"). A new trial was held solely on punitive damages in February 2012. Before trial, the trial court ordered, based on the 2008 Opinion, that Thomas's request for damages must be for less than $1,500,000. Thomas argued against this de facto remittitur (22-4-12-cd=24-21, 5:53:12) and the Hospital argued for it. The jury awarded the full amount requested at trial, $1,450,000. The Hospital appealed and the Court of Appeals entered an Opinion Affirming on December 6, 2013 ("2013 Opinion"). The Hospital then

[1] These two physicians were initially defendants but had settled with Thomas before trial.

sought discretionary review by this Court, which was granted.

ARGUMENT

I. THE HOSPITAL IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW

The Hospital's arguments that Thomas did not produce sufficient evidence of gross negligence or ratification must fail, as there was no clear error resulting in a "verdict [that] is palpably or flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice." *Aesthetics in Jewelry, Inc. v. Brown*, 339 S.W.3d 489, 495 (Ky. App. 2011).

A. The Punitive Damages Award Was Amply Supported By Evidence

This Court set out the standard for awarding punitive damages in *Gibson v. Fuel Transport, Inc.*, 410 S.W.3d 56, 59 (Ky. 2013): "Punitive damages may be awarded upon a finding that the plaintiff acted with gross negligence. Phelps v. Louisville Water Co., 103 S.W.3d 46, 51-52 (Ky.2003). 'In order to justify punitive damages there must be first a finding of failure to exercise reasonable care, and then an additional finding that this negligence was accompanied by wanton or reckless disregard for the lives, safety, or property of others.' Horton v. Union Light, Heat & Power Co., 690 S.W.2d 382, 389-90 (Ky.1985) (internal quotations omitted)." The jury found that the Hospital acted toward Mr. Gray with gross negligence, which was defined in the instructions as "reckless indifference or disregard to the lives and safety of other persons."

The gist of the Hospital's argument that the award was flagrantly against the evidence is that the Hospital did some things right while Mr. Gray was its patient on April

8 and 9, 1999, so the Hospital exercised "slight care," precluding a punitive damages award. That argument must fail. Suppose, hypothetically, a hospital provided an appropriate medical screening to an emergency department patient, admitted him, facilitated some diagnostic testing, provided nursing care, and then said, "We can see you have an emergency medical condition, but we don't like you and don't want to treat you, so you are discharged." If the Hospital's argument is accepted, the performance of an appropriate screening and provision of some services would show that the hospital had exercised at least "slight care" for the patient and preclude any finding of gross negligence, which would be obviously absurd in this hypothetical.

A similar argument was made unsuccessfully by the defendant/appellant in *Garlock Sealing Technologies, LLC v. Robertson,* No. 2009-CA-000483-MR (Ky. App. 2011) (*not to be published*). The defendant contended that punitive damages were not appropriate because it exercised slight care in that it complied with OSHA regulations. Said the Court: "[E]ven if Garlock had complied with all applicable OSHA regulations, whether Garlock's behavior evinced a reckless disregard for the health and safety of others remained an issue of fact for the jury."

In the present case, the jury heard a great deal of evidence that could have caused it to reasonably conclude, as it did, that the Hospital was grossly negligent. Among such pieces of evidence are the following: An untreated perforated ulcer can lead to someone's death pretty quickly. (Dr. Joseph Richardson, 22-4-12-cd=24-13, 9:56:06.) Generally it's clear and convincing to anyone that for a physician or someone acting on behalf of the hospital to ignore a potential life-threatening emergency is a reckless

disregard of the patient's life and safety. (*Id.* at 10:02:15.) If a physician has a patient who is vomiting up coffee ground emesis, before sending the patient home, the physician, if acting in a non reckless way, is going to rule out whether or not that person has that emergency medical condition, because not to do that is a reckless disregard of the life and safety of the patient. (*Id.* at 10:24:54.)

The nurses sent a man home who had vomited blood; that's a huge problem. It was absurd for anyone to send home a man who had had 200 cc's of coffee ground emesis. (Dr. Frank Baker, 22-4-12-cd=24-12, 2:13:35.) It was outrageous for the nurses to have sent this man home on April 9. (*Id.* at 2:18:32.) "I am absolutely stunned by what happened on the last visit. I mean, I think a sophomore medical student could have done the appropriate thing in this case, which is to have admitted the patient into the hospital, resuscitated the patient, started the patient's IV, and so on. This case is truly shocking from the standpoint of it is so obviously a patient who is very sick who needs to be resuscitated, who needs to be admitted to an ICU, who needs a surgical consult, who needs to have a whole bunch of other things done who was sent home. (*Id.* at 2:21:39.) Reviewing the records regarding nursing care, the words Dr. Baker would have chosen to describe that nursing care are "flagrant violations of the standard of care, particularly egregious, outrageous, not understandable, not easily explainable; they are just so out of keeping with what nurses are taught about caring for patients, it is just a bit mind-boggling to figure out why and how it happened." (*Id.* at 2:23:36, 2:25:01.)

A surgeon should have been called to see Gray on April 8 and a CT scan should have been performed. This is a simple twenty-minute test that would have diagnosed his

condition and he would have treated and not gone on to perforate. (Dr. Stuart Battle, 22-4-12-cd=24-13, 1:41:16.)

On April 8, if the nurses had gone up the chain of command and gotten someone's attention and appropriate medical treatment was obtained, his life would have been saved. (Dr. Eric Munoz, 22-4-12-cd=24-8, 3:11:30.) All of Mr. Gray's symptoms on April 9 showed that he had an emergency medical condition. Dr. Munoz "can't understand how they could have done this." (Munoz, 22-4-12-cd=24-9, 4:20:25.)

Even in the absence of a specific hospital policy, the standard of care requires continual assessment and that vital signs be taken at discharge when a patient had abnormal vitals at triage, as Gray did, but his vital signs were not taken at discharge around 12:40 a.m. on April 9. (Janice Rodgers, R.N., 22-4-12-cd=24-6, 11:41:10.) The nurses deviated from the standard of care by not acting as patient advocates. (*Id.* at 11:32:03, 11:32:48.)

On April 9, a Hospital social worker told Larry Thomas, Mr. Gray's nephew, that if Mr. Gray returned to the Hospital, he would be arrested; the hospital was a hospital for sick people, not a hotel. (Larry Thomas, 22-4-12-cd=24-12, 9:48:14, 9:54:52, 9:56:04.) On April 9, a Hospital social worker told Connie Mosley, Mr. Gray's sister, that they were going to call the police and remove him from the premises and have him locked up. (Connie Mosley, 22-4-12-cd=24-8, 11:13:57, 11:15:45.) Marilyn Swinford, the Hospital's director of emergency services, told Betty Hughes, Mr. Gray's sister, that if Mr. Gray came back to the hospital, they would call the police and have him escorted off the premises and maybe have him arrested. (Betty Hughes, 22-4-12-cd=24-8, 1:59:18.)

This occurred when Ms. Hughes saw Ms. Swinford and Nurse Hicks in the emergency department on April 9, and Ms. Swinford told her that they had sent Mr. Gray home because he was belligerent and acting out, and if Mr. Gray came back, they would call the police. (Betty Hughes, 22-4-12-cd=24-20, 2:02:59.) At his sister Wilma Gray's home shortly after leaving the Hospital on April 9, Mr. Gray told his sister Betty Hughes that he did not want to return to the Hospital because they'd already mistreated him enough; they had told him that if he came back there, they were going to have him arrested. (Betty Hughes, 22-4-12-cd=24-8, 2:00:43.)

Choosing to ignore something that could kill someone quickly would be a reckless disregard of the patient's life. (Marilyn Swinford, 22-4-12-cd=24-13, 2:32:35.)

On April 9, it was "simply outrageous" to not admit Gray to the hospital when he had vomited coffee ground emesis all over, had a 14.9 white count, dark urine, very little urine, complaints of severe abdominal pain, tenderness to palpation, a marked shift to the left, and a previous history of having been there. (Dr. Stuart Battle, 22-4-12-cd=24-12, 1:46:12.)

A CT scan and surgical consult are normally ordered for someone with the symptoms Mr. Gray had on April 9. If he had been appropriately treated, his life would have been saved. If the nurses had gone up the chain of command and gotten the appropriate treatment for him, his life would have been saved. (Dr. Eric Munoz, 22-4-12-cd=24-9, 4:26:50.)

Dr. Munoz characterized the Hospital's conduct as follows:

I would say the hospital's conduct -- I mean, the words horrific, egregious.

> I can't believe that in 1999 this would happen in the United States in America. But it did happen. That's why we're sitting here. The reason this law was passed in 1988 was to try to help and prevent this from ever happening. But it happens. And it happened here. And this is just horrific. I mean, this person died preventably and died a horrible death. And I'm just shocked.

(*Id.* at 4:24:40.) On April 9, if the doctors had followed the rules, stabilizing Mr. Gray and getting him necessary treatment, his life absolutely would have been saved. (Munoz, 22-4-12-cd=24-8, 3:10:16.)

> On April 9, Gray was declining steadily. According to Janice Rodgers, R.N.:
>
> Essentially they quit on Mr. Gray. . . . It's been my experience that nurses who are -- have been -- who demonstrate this kind of behavior are just trying to get the patient out of their emergency room. That's been my experience. We used to call them GOMERs, Get Out of My Emergency Room. . . . And it just reflects the dismissive attitude of the nurses, and that they recklessly endangering this man by ignoring standards of care, deviating from standards of care -- essentially ignoring them. . . . I don't understand why they would do it. And I'll tell you, in my experience, people presenting with this kind of presentation, clinical presentation, everything is done for them to -- even up to and including going up the chain of command, after you collaborate with the healthcare provider, to get the patient admitted. He needs a line. If you can't do it in the emergency room, you need to call the surgeon. He needs a line. He's essentially circling the drain, and that was disregarded.

Nurse Rodgers characterized the conduct of the nurses as "reckless disregard . . . reprehensible . . . nothing that nursing stands for . . . I don't understand why." (Rodgers, 22-4-12-cd=24-6, 1:54:04.) "They were negligent in this in that they did not approach Mr. Gray as someone who was sick. They were reckless. They just disregarded, completely disregarded, the signs and symptoms that were obviously present that showed that he was very ill. You don't need a medical diagnosis to show that he was very ill. There were signs there in black and white. This man was sick." (*Id.* at 1:57:52.) "This

man was sick, it was critical that he get some care, and the nurses did not stand up for him, and they were reckless in not standing up for him in disregarding all of this. They were reckless. They were reckless. I'm sorry." (*Id.* at 2:02:54.) The nurses acted like they didn't care whether he got the care he needed. They totally disregarded all nursing standards of care and all the policies. The man was sick, it seemed not to matter that he was sick. They didn't do assessments, didn't make sure he had an IV line by any means possible, and didn't go to the health care provider on either visit and say he's sick. "Mr. Gray had nobody to stand up for him. This is totally disgusting. It turns my stomach. And it's reckless disregard, grossly disregarding all of the standard of care that say that otherwise should have been done. (*Id.* at 2:23:40.) The nurses disregarded the standard of care, disregarded the policies of the hospital, and disregarded Mr. Gray, recklessly. (*Id.* at 2:06:02.)

It was the jury's province to weigh all the evidence on both sides of the gross negligence issue and decide whether gross negligence—reckless disregard—was shown by clear and convincing evidence. The jury heard evidence for thirteen days, deliberated for nearly nine hours, and concluded that clear and convincing evidence established that the Hospital was grossly negligent. Based on all the evidence, the Court should not now conclude that no reasonable jury could have made such a finding.[2]

B. There Was Ample Evidence Of Ratification

There was plenty of evidence from which the jury could reasonably conclude that the Hospital ratified the grossly negligent conduct of its employees and other agents.

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[2] Indeed, this was the second jury to have done so.

The case of *University Medical Center, Inc. d/b/a University of Louisville Hospital v. Beglin*, 375 S.W.3d 783 (Ky. 2011), supports Thomas's position, not the Hospital's. In *Beglin*, the University of Louisville Hospital was unable to offer any explanation to account for the disappearance of an important incident report prepared following a surgery in which the patient did not get blood from the blood bank in a reasonable time. Shortly after the surgery, the surgeon reported the matter to the hospital's risk management staff and advised that the Beglin family should not be billed for the surgery. (*Id.* at 791-92.) The Supreme Court concluded that it was reasonable to infer that the report was "lost or destroyed by a person with an interest in preventing the disclosure of its contents." (*Id.* at 792.) The *Beglin* Court held that there was no ratification, since the poor quality of the hospital's investigation did not equate with ratification, *id.* at 794, and the apparent cover-up was reprehensible but did not constitute ratification. "The alleged cover-up implies, not confirmation or approval of the negligence, but disapproval and a misguided attempt by the hospital to distance itself from the tortious conduct, which is the opposite of ratification." (*Id.*)

The circumstances in *Beglin* are quite different from those in the present case. In *Beglin*, there was a poor-quality investigation and an alleged cover-up. In the present case, the evidence was that there was no investigation, no report of EMTALA violations as required, no sanctions, discipline, or re-training of anyone, no reprimand of anyone, no repudiation of anyone's conduct, and absolute approval by the Hospital's director of emergency services and other Hospital management of what everyone did with respect to Milford Gray, as set out below. The Court of Appeals recognized that "the pattern of

misconduct by the Hospital employees goes well beyond the relatively discrete instances of gross negligence which occurred in *Beglin*." (2013 Opinion at 10-11.)

Thomas's proof on this issue can be summarized as follows:

Marilyn Swinford, R.N., was the Hospital's director of emergency services. (Marilyn Swinford, 22-4-12-cd=24-13, 10:52:24.) She was responsible for the day-to-day operations of the emergency department, for long-range planning, and for developing of capital and operating budgets. She was accountable for resources and departmental policy and procedure. (*Id.* at 1:58:19.) Service directors (such as Ms. Swinford) developed goals and objectives for their services, for nursing services as a whole, and for the hospital. (*Id.* at 1:58:49.) She testified that in her opinion, everything that was done was done in an appropriate way. She approves of what the nurses did. She approved it then, and today. (*Id.* at 2:04:01.) She ratified it then and today. (*Id.* at 2:04:15.) She never repudiated any nurse's conduct or talked to any nurse about her action or inaction in this case. (*Id.* at 2:04:23.) She condoned what the nurses did. (*Id.* at 2:05:37.) At no point did the Hospital tell anyone involved in the care of Gray that they had done anything wrong. (*Id.* at 2:05:59.) At no point did the Hospital discipline anyone for any conduct that occurred with respect to Gray. (*Id.* at 2:06:10.) The Hospital never at any point retrained anyone with respect to the requirements of EMTALA. (*Id.* at 2:07:22.) The Hospital never implemented any new measures to make sure that what happened to Gray doesn't happen to anybody else. (*Id.* at 2:09:15.) She would have expected the nurses to perform the way they did. (*Id.* at 2:30:37.) In 1999 she did not advise the nurses or the Hospital to report any EMTALA violation related to this case and did not

repudiate any conduct of the nurses. (*Id.* at 2:47:36.) St. Joseph Hospital never reported any violation of EMTALA. (*Id.* at 2:29:21.) Ms. Swinford also testified that "a policy is set as a guideline." (*Id.* at 11:35:50.) There are disruptions and distractions in the ED and it may not be possible to take vitals every two hours, although there is a policy requiring the nurses to document vital signs every two hours a patient is in the ED. (*Id.* at 11:36:24.) On the one hand, the Hospital implements policies to protect the safety of the patients; on the other, the policies are there as guidelines. (*Id.* at 11:36:45.)

Nurses Angie Shacklette and Tish Platt, who were involved in Mr. Gray's care on April 9, testified that the Hospital did not require any re-training of any nurse and there was no discipline of any sort of any nurse because of what happened to Gray. (Angie Shacklette, 22-4-12-cd=24-16, 2:07:14; Tish Platt, 22-4-12-cd=24-15, 2:36:52.) Another nurse, Nancy Hicks, testified that no one counseled her, met with her to look at her notes from April 9, or called her in to talk about what happened. (Nancy Hicks, 22-4-12-cd=24-12, 2:28:14.)

Dr. Eric Munoz, Thomas's hospital management expert, testified that there was nothing in any of the records indicating that the Hospital undertook any investigation of what happened. (Munoz, 22-4-12-cd=24-9, 4:32:55.) The Hospital was required under EMTALA to self-report any violations of EMTALA, but no one reported any EMTALA violations, and no one conducted an investigation. (*Id.* at 4:33:55.) These things indicate that the administration, the Hospital management, either approved or ratified, or in some way condoned, this behavior, or otherwise there would have been an investigation, there should have been an investigation. There are internal hospital procedures required by

federal commissions that this type of thing be investigated, and to not have it investigated would mean that the Hospital management condoned it. (*Id.* at 4:34:45.) The fact that no question was ever asked of the social worker who wrote in her note the suggestion of police intervention of Mr. Gray returned to the Hospital also indicates that the Hospital ratified and authorized and approved the conduct in this case. (*Id.* at 4:35:20.) The fact that Marilyn Swinford, the director of the emergency department, who was the signer of many written policies, told Mr. Gray's sister Betty Hughes that if he came back, the police would be called, shows that the Hospital's management both authorized and condoned this type of behavior. (*Id.* at 4:38:01.)

See Simpson Co. Steeplechase Assoc., Inc. v. Roberts, 898 S.W.2d 523 (Ky. App. 1995) (emphasizing the importance of the jury's decision regarding "the authorized or ratified or should have anticipated" determination).

1. Thomas proved ratification

The Hospital argues that "[a]nything short of an affirmative act by an employer or principal to approve its employees' or agents' conduct is insufficient as a matter of law" and that ratification must be "explicit." (Brief of Appellant at 13.) The law does not require an "affirmative act," and ratification may be implied by the facts and circumstances.

The first case cited by the Hospital, *Stewart v. Mitchell's Adm'x*, 190 S.W.2d 660 (Ky. 1945), states that to find ratification, there must have been a "manifestation of an election . . . to treat the act as authorized"—not an "affirmative act." The Court noted that this tort claim involved **implied** ratification. *Id.*

Wolford v. Scott Nickels Bus Co., 257 S.W.2d 594 (Ky. 1953), also approved of implied ratification. The Court wrote, "There must be an intention to ratify, although the intention may be inferred from the facts and circumstances. As a consequence, ratification cannot be inferred from acts which may be readily explained without involving any intent to ratify." *Scott Nickels Bus Co.*, 257 S.W.2d at 596. The Court merely felt that the principal's explanation of his conduct was more reasonably explained by something other than ratification. *Id.* The Court then went on say, without discussion, that there is a "rule that in ratification by the principal of a tort of the agent it is essential that the ratification be explicit." *Id.* Since the Court had already noted that the intention to ratify may be inferred from the facts and circumstances, clearly, "explicit" does not mean that ratification may not be inferred from the facts and circumstances.

The *Beglin* Court defined ratification in 2011 by writing, "The verb 'to ratify' means: 'to approve and sanction formally; confirm (ratify a treaty).' Accordingly, ratification is, in effect, the after the fact approval of conduct . . . ." *Beglin*, 375 S.W.3d at 794. (This definition was used in the jury instructions in the present case.) There was no mention of ratification requiring an "affirmative act;" rather, the *Beglin* Court considered whether the poor-quality investigation and attempted cover-up constituted ratification. In finding that they did not, the Court's reasoning was *not* that these were not affirmative or explicit acts. *See id.*

Further, the Hospital incorrectly stated that "*Beglin* required 'formal' rather than implicit post-incident ratification." (Brief of Appellant at 15.) The Hospital does not explain what it thinks "formal" ratification would require in the context of after-the-fact

ratification of grossly negligent conduct, but it is clear from the *Beglin* case itself that it does not mean that the Hospital's management had to sit down at a conference table and ratify the conduct as though a peace treaty were on the table. Rather, the *Beglin* Court looked at the various things that were done or not done by hospital personnel to determine if there was ratification, just as the trial court and Court of Appeals did in the present case.

The case of *Patterson v. Tommy Blair, Inc.*, 265 S.W.3d 241 (Ky. App. 2007), also supports Thomas's position. The Court wrote that it could not find that a dealership ratified an employee's tortious conduct, although it did not officially discipline or reprimand him, because the owner talked with the employee, who "knew he should not have done it," repudiated the employee's actions, and advised the employee to turn himself into the police. *Patterson*, 265 S.W.3d at 245. The clear inference is that if the dealership had not talked with the employee, repudiated his actions, and advised him to turn himself into the police, there would have been ratification. *See also Scott v. Allstate Ins. Co.*, 553 P.2d 1221, 1226 (Ariz. App. 1976) ("In order to hold an employer liable for the consequences of an employee's tort on the ground of ratification, there must clear evidence of the approval of the wrongful conduct. The continuance of employment alone is insufficient to show such approval. . . . The undisputed evidence in this case shows that Mr. Booen was reprimanded by the company and that the Allstate policy was cancelled and the money returned.")

In the present case, the circumstances are entirely different than in *Patterson* or *Scott*, because the evidence was that Hospital management did *nothing*. There was no

investigation, no conversations with the nurses about their care of Mr. Gray, no assurances by anyone that they knew they should have acted differently, no reprimands, no re-training, no repudiations of anyone's conduct, and no instructions to anyone to report violations of EMTALA. Therefore, under *Patterson* and *Scott*, ratification can reasonably be found to have occurred. *See also* 2A C.J.S. Agency § 66 ("An agent's acts may be ratified either expressly or impliedly. Affirmance of an unauthorized act or transaction can be established by any conduct of the purported principal manifesting that he or she consents to be a party to the transaction, or by conduct that is justifiable only if there is ratification. Moreover, an affirmance of an unauthorized transaction can be inferred from a failure to repudiate."); 2A C.J.S. Agency § 68 ("Ratification of an agent's unauthorized acts may be implied from the acts or conduct of the principal, provided that there are some acts or conduct on his or her part which reasonably tend to show the requisite intention to ratify. Implied ratification is just as effective as express ratification."); 2A C.J.S. Agency § 71 ("Acquiescence or silence on the part of a principal is a factor to be considered in connection with other circumstances which may constitute a ratification, and acquiescence or silence alone may be deemed to justify an inference that a ratification exists in a particular case, particularly where the circumstances impose a special duty upon the principal to speak.").

2. Thomas is not alleging there was an inadequate investigation

Thomas has no quarrel with the Hospital's argument, based on *Beglin*, that a poor-quality investigation is not evidence of ratification. However, the present case does not involve a poor-quality investigation, it involves *no* investigation in combination with

other facts evidencing ratification. This is significant because the fact that the hospital in *Beglin* conducted an investigation—even a poor-quality one—shows that it recognized that something bad had happened that should be investigated, whereas the Hospital in the present case thought the conduct that caused in Mr. Gray's suffering and death was fine and did not need to be investigated. In *Beglin*, in short, there was evidence that the hospital did not condone the grossly negligent conduct, which is the opposite of ratification. In the present case, on the other hand, there was much evidence to the effect that the Hospital ratified everything done with respect to Mr. Gray; there was no incident report, no report by anyone expressing concern, no cover-up--in short, no investigation at all. Marilyn Swinford, the emergency department director, looked at the chart with one of the treating doctors and then, approving of everything that was done, did nothing more. (Swinford, 22-4-12-cd=24-13, 11:24:43.)

3. There is no dispute that the Hospital's defense at trial did not establish ratification

As for the Hospital's complaint that Thomas's case had a "recurring theme throughout trial" that the Hospital ratified gross negligence by defending itself at trial (Brief for Appellant at 16), there was no such "theme." The written instructions informed the jury that the Hospital's approval during litigation of any acts of employees or agents did not constitute ratification. The Hospital misleadingly stated in its Brief, "While Ms. Swinford was testifying, Plaintiff attempted to get Ms. Swinford to ratify any wrongdoing by the Saint Joseph nurses by asking whether she approved or condoned their conduct that morning." (Brief of Appellant at 16, fn 10.) The Hospital's implication that this

evidence was to the effect that Swinford approved, condoned, or ratified conduct only while she was on the stand as a Hospital witness is false; in fact, Swinford testified in multiple ways that she approved, condoned, and ratified their conduct then, in April 1999. *See* summary of her testimony in this regard in section I(B) above. The Hospital then continued, "The testimony of Ms. Swinford could not, however, establish ratification of a grossly negligent act as she never testified that any act she witnessed constituted gross negligence." *Id.* That argument is peculiar because, obviously, ratifying grossly negligent conduct does not mean acknowledging that the conduct was grossly negligent.

4. The Hospital is wrong in describing Thomas's case as based solely on violations of policies

The Hospital argued that Thomas's "nursing expert's criticisms of Saint Joseph focused entirely on the failure of the nurses to follow hospital polic[i]es." (Brief of Appellant at 18.) That is inaccurate.

There was evidence that policies were violated but there was also much evidence that there were numerous violations of the standard of care and grossly negligent conduct, in addition to violations of Hospital policies, by nurses and physicians. It certainly cannot be said (as it could in *Beglin*) that but for policy violations, the grossly negligent failures to properly care for Mr. Gray, advocate for him, and stabilize him before discharging him from the Hospital would not have occurred. Furthermore, the Hospital's director of emergency services, Marilyn Swinford, essentially testified that it was all right for the nurses to not follow the policies all the time because they were guidelines and sometimes it wasn't possible for the nurses to follow them. (Swinford, 22-4-12-

cd=24-13, 11:35:50, :36:24, :36:45.) Thus, the Hospital not only ratified the violation of hospital policies but it can reasonably be inferred that the Hospital should have anticipated that policies would be violated, compromising patient safety.

II. THE HOSPITAL IS NOT ENTITLED TO A NEW TRIAL

A. Awarding Punitive Damages Based On Conduct of Employees And Other Agents, Including Physicians, Is Appropriate

The Hospital's argument that the trial court erroneously instructed the jury that Drs. Parsley and Geren were agents of the Hospital for purposes of KRS 411.184(3) (the punitive damages statute) (Brief of Appellant at 19), must fail for two reasons: It has previously been resolved, and it is legally incorrect.

This issue has previously been resolved. In the first appeal, the Hospital argued that it was entitled to a directed verdict on the punitive damages claim because "there was no evidence showing that it had ratified the conduct of *the physicians* and Hospital staff" and no "authorized-or-ratified-or-should-have-anticipated" instruction was given, or alternatively it was entitled to a new trial with such an instruction, and the Court of Appeals agreed that it was entitled to such an instruction, noting that "[n]ot only did the court fail to provide such an instruction, its answer to the jury's question implied that it could impose punitive damages on the Hospital for the acts of its agents without a finding that it ratified or had reason to know of their conduct." (RA: 3475-77 (emphasis added).) Additionally, in the first appeal, the Hospital argued that it was entitled to a new trial because of juror confusion. As part of that argument, it pointed out that during deliberations, the jury sent out two questions. The first asked if the EMTALA instruction

included the doctors and nurses, and the trial court instructed the jury that it should consider the doctors' and nurses' conduct to the "extent they are agents or servants of the Hospital." Second, the jury asked if the doctors' conduct was to be considered with respective to the punitive damages instruction, and the trial court answered "yes." (RA: 3471-72.) The Court of Appeals found that the EMTALA instruction was substantially correct (RA: 3473) and wrote, "In any event, the trial court answered the jury's questions about the distinctions between the negligence and EMTALA claims. The Hospital does not directly argue that any of the court's answers were incorrect, and the jury did not indicate that it had any further difficulty reaching a verdict on these claims." (*Id.*)

Since the Hospital did not argue in the first appeal that it could not be held liable for violations of EMTALA based on conduct of physicians or that punitive damages could not be assessed based on conduct of physicians if ratification was shown, those arguments by the Hospital in this appeal should not be considered. This Court already resolved the issue, as explained above; the Hospital waived the issue by not raising it in the first appeal; and/or the Hospital should be estopped from raising it now because the Hospital had the opportunity to pursue that argument in the first appeal and did not do so, upon which Thomas relied before and during the second trial.

Second, the Hospital's argument that it was improper to instruct the jury that "[f]or purposes of EMTALA, doctors, as well as nurses and other employees of Saint Joseph, are agents of Saint Joseph" is legally incorrect. The trial court's pre-trial ruling that the Hospital could not be held *vicariously* liable for the acts or omissions of physicians does not mean the Hospital cannot be punished for EMTALA violations by

those physicians, for which the Hospital is *directly* liable.

The Hospital stated that "the Court of Appeals could not point to any law that would support" the Hospital being punished for the "acts of persons that were not its agents or employees." (Brief of Appellant at 20.) That is misleading and untrue. The Court of Appeals, citing *Roberts v. Galen of Virginia, Inc.*, 112 F. Supp. 2d 638 (W.D. Ky. 2000), agreed with Thomas that it is proper to punish the Hospital for conduct of the physicians (as well as the conduct of others) because EMTALA imposes *direct* rather than vicarious liability on a hospital for the actions of its physicians and others, and the duties imposed on hospitals by EMTALA are non-delegable. (2013 Opinion at 21-22.)

In *Roberts*, the Court rejected the defendant hospital's argument that it could not be held liable for a physician's violations of EMTALA because the Court had previously held that the physician was not the ostensible agent of the hospital for the purpose of the state law negligence claim (just as occurred in the present case), writing that it is clear from the EMTALA statute that Congress "intended to hold hospitals directly accountable for the actions of physicians and other medical personnel" and that the "Secretary of Health and Human Services supports the notion that hospitals are directly rather than vicariously liable for the actions of physicians: 'The statute imposes duties on a hospital, many of which can only be effectively carried out by physicians in some way affiliated with the hospital. Neither the statute nor the regulations attempt to define the means by which the hospital meets its statutory obligations to provide emergency screening examination, treatment or transfer.' 59 Fed.Reg. 32,086, 32,115 (1994)." *Roberts*, 112 F.

Supp. 2d at 640-41.[3]

After that 2000 ruling by the *Roberts* trial court, the case was tried and the plaintiff lost and appealed. The plaintiff contended that the trial court had erred in giving a jury instruction requiring the jury to determine whether "[t]he physician responsible for her transfer had actual knowledge of that condition" because that instruction shielded the hospital from EMTALA liability for the participation of its social workers, nursing staff, and administration. *Roberts v. Galen v. Virginia, Inc.*, 325 F.3d 776, 788 (6th Cir. 2003). The Sixth Circuit agreed, holding that the instruction was erroneous: "The language of EMTALA clearly implies that Galen is responsible not only for the actions of its doctors, but also for the actions of its other employees. The EMTALA statute, in all its sections, refers to the obligations of hospitals, rather than physicians. . . . We . . . believe that any hospital employee or agent that has knowledge of a patient's emergency medical condition might potentially subject the hospital to liability under EMTALA." *Id.*

Since the Hospital is responsible for EMTALA violations of acts of persons "affiliated or associated, directly or indirectly" with the hospital, including physicians and others, *Roberts,* 112 F. Supp. 2d at 640, and physicians are agents of the hospital for purposes of EMTALA, *Roberts*, 325 F.3d at 788, the Hospital is responsible for punitive damages assessed against it on the basis of EMTALA violations by anyone "affiliated or associated, directly or indirectly" with it, including physicians who are independent contractors, for whose negligence the Hospital is not *vicariously* liable, as long as the

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[3] *Roberts* also held that non-physicians can be liable for EMTALA violations, inasmuch as the coverage of EMTALA's stabilization requirement is broader than just the discharge of patients. *Roberts*, 112 F. Supp. 2d at 640.

"authorized or ratified or should have anticipated" requirement of KRS 411.184(3) is met. *See also Morin v. Eastern Maine Med. Cntr.*, 779 F. Supp. 2d 166 (D. Me. 2011) (upholding, without discussion of physicians' status, award of punitive damages against hospital for EMTALA violations committed by physicians); *Wiggs v. City of Phoenix*, 10 P.3d 625, 628 (Ariz. 2000) (noting that an independent contractor can be an agent and that "[w]here there is a non-delegable duty, the principal is 'held liable for the negligence of his agent, whether his agent was an employee, or an independent contractor'" (citation omitted)); *Naujoks v. Suhrmann*, 337 P.2d 967 (Utah 1959) (noting that being an agent for one purpose does not make one an agent for all purposes).

The Hospital's argument discusses agency law and simply ignores the fact that hospitals are *directly* liable for EMTALA violations. Since hospitals are directly liable under EMTALA for the actions of physicians and others, agency law is beside the point, and hospitals can ratify the actions of physicians that violate EMTALA in the course of meeting its statutory obligations to, among other things, not discharge unstabilized patients with an emergency medical condition. The Hospital's argument to the contrary based on a hospital not being able to control or make medical judgments for a physician is unfounded. The essence of the principle/independent contractor relationship is that the principle may tell the independent contractor *what* to do (for example, in this context, comply with EMTALA by stabilizing patients with emergency medical conditions before discharging them) but not *how* to do it.

In short, the Hospital mischaracterizes the nature of its punishment—it is not being punished for the acts of persons who are not its agents, it is being punished for *its*

own conduct, inasmuch as it is *directly liable* for compliance with EMTALA. There is nothing novel about that.

B. The Hospital Was Not Deprived of a Fair Trial Because a Juror May Have Slept During Portions of the Trial

The Hospital next argued that it is entitled to a new trial because Juror 4642 may have been sleeping at times at trial and the trial court did not remove him. The trial court's decision is reviewable only for abuse of discretion. *Lester v. Commonwealth,* 132 S.W.3d 857, 863 (Ky. 2004). The trial court did not abuse its discretion. It was not possible for the parties or the Court to be sure if Juror 4642 was sleeping or merely had closed eyes at any particular time. If in fact Juror 4642 was sleeping at times, this began while Thomas was putting on its case, not after the Hospital began its case. Furthermore, Thomas continued to put on evidence through cross-examination during the Hospital's case in chief, and during rebuttal proof. If Juror 4642 failed to hear evidence because he was sleeping, then he failed to hear evidence favoring both parties.

Dimas-Martinez v. State of Arkansas, 385 S.W.3d 238 (Ark. 2011), cited by the Hospital, actually supports Thomas's position. It was a capital murder case where a juror slept during the guilt phase of trial, a fellow juror was nudging him to keep him awake, and the juror admitted when questioned by the court that he was drowsy and he had been bumped by another juror to awaken him. Not only is this case distinguishable by virtue of being a murder case and because there was more evidence that a juror actually dozed, including questioning by the trial judge, but also it supports Thomas's dispositive argument that *prejudice must be shown* for juror misconduct, including sleeping, to

constitute cause for a new trial. The Court wrote that "the moving party bears the burden of proving both the misconduct and that a reasonable possibility of prejudice resulted from it. . . . We will not presume prejudice in such situations. . . . The moving party must show that the alleged misconduct prejudiced his chances for a fair trial. Whether unfair prejudice occurred is a matter for the sound discretion of the circuit court." *Dimas-Martinez*, 385 S.W.3d at 244 (internal citations omitted).

In Kentucky, as in Arkansas, to prevail, the appellant must show prejudice, which the Hospital has not done and cannot do. Since the jury's verdict was 11 for Thomas and 1 against, the juror's sleeping, if any, did not prejudice the Hospital. The Hospital inaccurately contended in its Brief that it does not have to show prejudice, ignoring recent Kentucky case law. In *Sluss v. Commonwealth*, 381 S.W.3d 215 (Ky. 2012), (which the Hospital cited in another part of its argument but ignored on the dispositive point of prejudice), this Court noted that the appellant "must do more than simply speculate that the relationship [a juror being Facebook "friends" with the murder victim's mother] might have somehow affected the jury verdict," *Sluss*, 381 S.W.3d at 223, and further wrote that it is "'incumbent upon the party claiming bias or partiality to prove the point. . . . [T]he question still is whether bias exists as a matter of fact, and that is not to be presumed. . . .' In other words, an appellant cannot simply speculate that the juror in question could have been biased against him," *id.* at 224 (internal citations omitted).

In *Ratliff v. Commonwealth*, 194 S.W.3d 258 (Ky. 2006), the appellant/defendant filed a CR 60.02 motion for a new trial based on having learned that a juror had been sleeping during trial. The trial court admitted that another juror had brought this

allegation to its attention during the trial. This Court declined to order a new trial on this basis, stating, "[A]s a threshold matter, the aggrieved party must present *some* evidence that the juror was actually asleep or that some prejudice resulted from that fact. The record does not even disclose at what point during the trial the juror allegedly slept, whether during the Commonwealth's or the defense's presentation of evidence, or during closing argument by counsel, or how Appellant was harmed by the occurrence." *Ratliff*, 194 S.W.3d at 276. In the present case, the Hospital has not gotten and cannot get past this threshold. The *Ratliff* Court also noted that the trial judge is in the best position to determine to nature of alleged juror misconduct and the appropriate remedy for any misconduct. *Id.*

See also Byrd v. Commonwealth, 825 S.W.2d 272, 275 (Ky. 1992) (". . . not every incident of juror misconduct requires a new trial. The true test is whether the misconduct has *prejudiced* the defendant to the extent that he has not received a fair trial."). In the present case, the trial court heard arguments of counsel both at trial and in the course of post-trial motions and declined to release the juror, grant a mistrial, and grant a new trial.

The Hospital relies on the older case of *Olympic Realty Co. v. Kamer*, 141 S.W.2d 295 (Ky. 1940), for the proposition that a showing of prejudice is not necessary for a new trial based on juror misconduct to be granted. However, in *Commonwealth v. Ginsberg*, 516 S.W.2d 868 (Ky. 1974), this Court discussed *Kamer* and impliedly overruled it in this regard, writing that "it is necessary, in order to obtain a reversal, to show that prejudice resulted because of the failure of the trial court to strike the biased juror." *Ginsburg*, 516 S.W.2d at 870.

The Hospital's argument that it is entitled to a new trial solely on the basis that Juror 4642 failed to answer affirmatively to a question during voir dire about whether anyone on the panel would be working third shift must also fail. First, that argument was not preserved. Although it was mentioned at trial and in the Hospital's post-trial motions that this had occurred, the Hospital never argued that the juror should have been excused or that it was entitled to a new trial on that basis. (R. 3867-3869.) Second, there has been no showing that the juror answered a voir dire question falsely; it is possible that when he answered the question, he did not know he would be working third shift. Third, again, the Hospital has not shown any prejudice.

C. The Jury's Punitive Damages Award Is Not Excessive And Is Constitutional

Finally, the Hospital argued that the punitive damages award of $1,450,000 is constitutionally excessive. Thomas emphatically disagrees.

The Court of Appeals wrote in its 2008 Opinion that given correct instructions in a re-trial (which was accomplished), "both the jury and the trial court will have an adequate framework in which to assess the appropriate amount of punitive damages." (RA: 3482.) Because the jury was not adequately instructed in the 2005 trial, "the jury had no basis to calculate the amount of punitive damages. As a result, the punitive damages award was clearly arbitrary and excessive." (*Id.*) In its 2013 Opinion, the Court of Appeals rejected the Hospital's argument that the 2012 jury award of $1,450,000 must also be excessive, explaining, "[I]n our prior opinion, this Court pointed out that that [sic] the punitive damages instruction was inadequate in several significant respects and thus a new trial was necessary on that issue. Consequently, any additional

discussion concerning the excessiveness of the original award was not necessary to the holding and was not binding on the trial court upon remand." (2013 Opinion at 22.) The Court of Appeals in the 2013 Opinion then properly proceeded to analyze anew the constitutionality of the 2012 award under the Due Process Clause of the Fourteenth Amendment pursuant to the factors set out in *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003), namely "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between . . . the civil penalties authorized or imposed in comparable cases." *Campbell*, 538 U.S. at 418, 123 S. Ct. at 1520.

This Court must review this issue *de novo*, but any doubts as to the appropriate amount of damages should be resolved in favor of the jury verdict. *Grassie v. Roswell Hosp. Corp.*, 258 P.3d 1075, 1087 (N.M. App. 2010). "It is vital that each case be carefully assessed in light of the specific facts involved, and the ultimate determination should be governed by the circumstances of each particular case. Moreover, the underlying purposes of an award of punitive damages must be satisfied." *Commercial Credit Equipment Corp. v. Stamps*, 920 F.2d 1361, 1370 (7th Cir. 1990). The "guideposts should neither be treated as an analytical straightjacket nor deployed in the expectation that they will 'draw a bright line marking the limits of a constitutionally acceptable punitive damages award.' Other pertinent factors may from time to time enter into the equation. When all is said and done, a punitive damage award will stand unless it clearly appears that the amount of the award exceeds the outer boundary of the universe of sums

reasonably necessary to punish and deter the defendant's conduct." *In re Ocasio*, 272 B.R. 815, 823 (1st Cir. BAP (P.R.) 2002), quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996). "The reviewing court's 'constitutional mission is only to find a level higher than which an award *may not* go; it is not to find the "right" level in the court's own view. While we must . . . assess independently the wrongfulness of a defendant's conduct, our determination of a maximum award should allow some leeway for the possibility of reasonable differences in the weighing of culpability. In enforcing federal due process limits, an appellate court does not sit as a replacement for the jury but only as a check on arbitrary awards.'" *Izell v. Union Carbide Corp.*, 230 Cal. App. 4th 1081, 1105, ___ Cal. Rptr. 3d ____ (2014), quoting *Simon v. San Paolo U.S. Holding Co., Inc.*, 35 Cal. 4th 1159, 1185-1186, 29 Cal. Rptr. 3d 379, 113 P.3d 63 (2005).

1. Reprehensibility

The degree of reprehensibility of the defendant's conduct is the first guidepost to be considered. *Gore*, 517 U.S. at 575.

The Hospital's treatment of Gray was truly reprehensible, as the jury found. This is the most important guidepost. *Id.* A jury has a "somewhat superior vantage" over reviewing courts with respect to this guidepost, "primarily with respect to issues turning on witness credibility and demeanor." *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 (2001).

The following facts were all established in the medical records: James Milford Gray was a paraplegic. He came to the Hospital on April 8, 1999, twenty hours before his death. He arrived by ambulance at about 7:00 p.m. and was received into the

emergency room complaining of diffuse abdominal pain of four days' duration. The differential diagnosis included peptic ulcer disease. It was also determined that Mr. Gray had a fecal impaction and he was manually disimpacted. His pain level was noted as 10 on a scale of 1-10. He was crying very loudly in the emergency room that his stomach hurt, and he requested repeatedly that someone help him. X-rays were taken. He was given magnesium citrate for constipation, Stadol for pain, and Phenergan for nausea, and the Stadol was increased due to Mr. Gray's continued and severe pain. Despite the fact that the cause of Gray's symptoms was never determined, the emergency room staff requested the help of Social Services to get him discharged. At 12:40 a.m. on April 9, he was placed in an ambulance without his wheelchair and without arrangements with his family as to his care. The ambulance returned with Gray at about 1:30 a.m., but no additional consideration was given to admitting him. Instead, he was placed in a wheelchair and pushed across the street to the Kentucky Inn, where he was left in a bed, without a wheelchair. Motel records indicate that Gray screamed in pain throughout the night.

Gray's next and final visit to the Hospital took place a few hours later on April 9, 1999, nine-and-one-half hours before his death. He was picked up by ambulance from the Kentucky Inn. The ambulance report indicates that the driver found Gray at about 5:10 a.m. in bed with his bedclothes covered with coffee ground emesis (vomiting of old blood). He was taken back to the Hospital, where he arrived at 5:45 a.m., complaining of upper quadrant abdominal pain and bloody coffee ground emesis. At that time, Gray was seen by Dr. Parsley. The initial emergency room report indicates there was bloody

vomiting for several hours before Gray's re-arrival. The treatment notes indicate that Gray was in moderate distress with generalized and moderate abdominal tenderness and guarding with moderate distension. The differential diagnosis again included peptic ulcer disease. The lab results, which were available before Gray was discharged, indicated an elevated white blood count representing a significant left shift, which means that an infectious or inflammatory process was present. The lab results indicated that these were "PANIC" values. Insertion of an IV was ordered but never accomplished.

The medical staff again sought his discharge and he was officially discharged between 7:00 and 7:30 a.m. but remained in the emergency room pending arrangements for his placement. Hospital records indicate that at 8:25 a.m., the staff notified Social Services concerning Mr. Gray's placement, despite the fact that he was being denied water because of vomiting. Records also establish that he suffered additional bouts of vomiting while still in the emergency department. Hospital records record that at 9:00 a.m. Mr. Gray was very restless and was calling for assistance every five minutes and asking for water. Social Services then arrived, and Mr. Gray continued to request water, but his water was limited secondary to vomiting. He was kept in St. Joseph Hospital in this state for three hours, all the while begging for water. He was then discharged in a wheelchair. Altogether, Gray endured pain and suffering for twenty hours and then died.

The Hospital's argument that the "only harm" was pain and suffering (Brief of Appellant at 36) confuses harm and damages, which is inappropriate in the punitive damages context. Thomas withdrew his claim for wrongful death damages to the estate because Mr. Gray had long been unemployed. That does not change the fact that the

harm to Mr. Gray included his death. It is well-established that the harm to be considered in this analysis includes actual harm and potential harm. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 461 (1993).

It is obvious that Mr. Gray's harm was physical as opposed to economic, and the evidence clearly shows—as the 2012 jury specifically found[4]—that the Hospital's conduct evinced an indifference to or a reckless disregard of Gray's life and health. The Court of Appeals found in both its 2008 and 2013 Opinions that the "jury could reasonably find that the Hospital evidenced a reckless disregard for the health and safety of others." (2013 Opinion at 24.) In its 2013 Opinion, the Court of Appeals wrote:

> In considering the matter upon remand, the jury clearly found that the aggravating conduct by the Hospital's staff outweighed any mitigating factors. While the Hospital's actions toward Gray may have been an isolated incident, EMTALA was enacted to prevent this type of conduct. Moreover, the Hospital's indifference to Gray's suffering created a high risk of physical harm to a person who was in an extremely vulnerable position. Finally, the Hospital's employees went to rather extraordinary lengths to intimidate Gray and his family from attempting to return. Considering the detailed jury instructions, we are satisfied that the jury properly weighed the aggravating and mitigating factors surrounding the Hospital's conduct.

Id.

The reprehensibility of the Hospital's conduct is enhanced by the likelihood at the time of the conduct that serious harm would arise from it. The jury heard evidence that an untreated perforated ulcer can lead to someone's death pretty quickly and this was a routinely treatable condition and if a CT scan had been ordered, the problem would have been correctly diagnosed, the standard treatment of surgery would have been done, and

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[4] And, indeed, as the 2005 jury found.

Mr. Gray's life would have been saved. Clearly, failing to stabilize Mr. Gray in the circumstances was highly likely to lead to serious harm and death. St. Joseph Hospital was well aware of the likelihood that failing to stabilize someone with Gray's symptoms was highly likely to lead to serious harm and death, even though for whatever reason the Hospital closed its eyes to or did not act on that awareness in this instance. There was testimony that a third-year medical student would have known that Mr. Gray's signs and symptoms on April 9 met EMTALA's definition of an emergency medical condition.

The reprehensibility factor of profitability, which is significant in commercial cases like *Gore*, is not applicable in this case.

With respect to the reprehensibility factor of the duration of the misconduct and concealment of it by the Hospital, the misconduct occurred more than once. The evidence was that the Hospital's conduct was grossly negligent in numerous ways on both April 8 and April 9, 1999. "[E]ach instance of substandard care to [a patient] constitutes a separate and distinct act of negligence or gross negligence on the part of the" hospital. *Hazard Nursing Home, Inc. v. Ambrose*, No. 2012-CA-000636-MR (Ky. App. 2013) (*not to be published*). Finally, the Hospital made no attempt to remedy the misconduct once it became known to it. The Hospital did not self-report violations of EMTALA as it was required to do and conducted no internal investigation, as the evidence showed it was also required to do, nor did it sanction, reprimand, repudiate, discipline, or re-train anyone.

The reprehensibility prong of the analysis unquestionably and strongly supports the constitutionality of the jury's punitive damages award.

2. Proportionality (Ratio)

The second *Gore* guidepost is the "disparity between the actual or potential harm suffered by plaintiff and the punitive damages award."

Gray's actual or potential harm includes the pain and suffering—including actual pain, humiliation, and fear—that he endured as well as his death. It does not matter that Thomas withdrew his wrongful death claim. In fact, even if Mr. Gray had not died, the possibility of death was clearly a potential harm that he could have suffered, and therefore supports the punitive damages awarded by the jury. Also of importance is a fact that does not feature in any of the cases cited by the Hospital or for that matter in any published case, as best Thomas can determine, discussing the punitives-to-compensatories ratio: The harm included the fact that Gray's right to stabilization of his condition under the federal EMTALA statute was violated by the Hospital.

The ratio is "a mere analytical tool . . . used to put into an intellectual context our admittedly emotional reaction to the award." *Ragland v. DiGiuro*, 352 S.W.3d 908, 920 (Ky. App. 2010). This Court must apply the "first blush" rule *de novo*. *Id.* at 924, fn. 8. "Under Kentucky's first blush rule, a damage award may be considered excessive if it 'cause[s] the mind at first blush to conclude that it was returned under the influence of passion or prejudice on the part of the jury.' [Citation omitted] Even if liberal, an award that does not shock the conscience or is not clearly excessive may not be set aside." *Id.* at 920.

Under Kentucky law, punitive damages may be awarded even when there is no award of compensatory damages, as long as the plaintiff suffered an injury for which at

least nominal compensatory damages might be awarded. *Fastenal Co. v. Crawford*, 609 F. Supp. 2d 650, 658-59 (E.D. Ky. 2009).

"To serve the goals of punishment and deterrence, 'a punitive damages award must send a message to the offender and others in similar positions that this sort of behavior will not be tolerated.' To send that message, the award must be large enough to deter similar future conduct without exceeding the amount necessary for punishment." *Century Surety Co. v. Polisso*, 139 Cal. App. 4th 922, 967 (2006), quoting *Bardis v. Oates*, 119 Cal. App. 4th 1, 26 (2004).

Because the compensatory damages awarded in this case were small, the ratio was high, but this does not mean that the punitive damages award was shocking, breathtakingly high, or unconstitutional. It was not. A mechanistic approach to evaluating the ratio factor, which was developed in commercial cases like *Gore*, is entirely unjust and unfair when the harm is personal unless there is *strong* consideration of the need for a much higher ratio when the compensatory damages are low, as they are in this case. In its 2008 Opinion, the Court of Appeals declined to advise on what amount of punitive damages would be constitutionally appropriate because the trial court ordered a new trial on the issue of punitive damages, but wrote that the trial court was "not entirely without some guidance on this issue" on remand, and then went on to discuss, as noted previously, that if properly instructed, the next jury would "have an adequate framework in which to assess the appropriate amount of punitive damages." This suggests that the 2008 Court of Appeals felt that the jury's assessment of the amount of punitive damages would be less open to being interpreted as constitutionally excessive if

it had been properly instructed, and, in fact, in its 2013 Opinion, the Court of Appeals ruled that an award by a properly instructed jury of $1,450,000 is constitutional.

It should be obvious that the ratios discussed in various cases as not being suspect, such as a 4-to-1 ratio or a single-digit ratio, would be entirely inappropriate in this case. Those ratios would authorize punitive damages awards that would not be even remotely punitive or deterrent—which would, in fact, have the opposite effect of reassuring St. Joseph Hospital, other hospitals, and for that matter all other companies that they do not have to be careful to avoid grossly negligent conduct when they are dealing with poor people, because when those people—Gray, instead of Gates—suffer and die, any punitive damages award will be a slap on the wrist, a cost of doing business easily absorbed into the balance sheet.

Furthermore, a small punitive damages award would deter, not grossly negligent conduct, but *any* redress for victims. Legal cases like this require an extraordinary expenditure of time and money—hundreds of thousands of dollars. A small award would lead to the next Mr. Gray being unable to find a lawyer to take his case. The courthouse doors would be closed to him. *Cf.* Barry Meier and Hilary Stout, *Victims of G.M. Deadly Defect Fall Through Legal Cracks*, N.Y. TIMES, http://nyti.ms/1rwdt3w, December 29, 2014 (describing refusal of lawyers to represent injured persons because of insufficient potential damages).

The Court of Appeals appropriately recognized that there is no bright-line ratio or mathematical formula and that the United States Supreme Court recognizes "that the degree of reprehensibility and the state's interest in punishment and deterrence may

justify a punitive damages award which is substantially greater than the award of compensatory damages." (2013 Opinion at 25-26.)

The United States Supreme Court has "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed." *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 424-25 (2003).

In *Gore*, the United States Supreme Court noted that "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach." The Court of Appeals discussed this pronouncement in *Ragland v. DiGiuro*, 352 S.W.3d 908 (Ct. App. 2010), noting that "due process will not permit both factors [compensatory award and ratio] to be 'substantial' because of the enhancing properties of the multiplication process. However, when either the compensatory award or the ratio is relatively low, the resulting product—the punitive award—is markedly reduced and constitutionally palatable." *DiGiuro*, 352 S.W.3d at 921. The Court then gave a hypothetical example: If the compensatory award in the case before it were $1 million and not $3.3 million, then the same ratio would result in punitive damages that would be "only $18 million, or $42 million less than what the jury awarded here. The effect of

factoring in a multiplication equation is dramatic when both the multiplier and the multiplicand are substantial. This is why a higher ratio is constitutionally acceptable when the compensatory award is lower . . . ." *Id.*

Another limitation of ratios is that they will vary widely depending on numerous factors about the plaintiff. Mr. Gray was single, unemployed, and indigent. A different sort of plaintiff, say, a young married man with a wife and children, working in a professional field, who was treated exactly the same as Mr. Gray, would likely be entitled to far higher compensatory damages. The compensatory damages could easily exceed $1,000,000. In that case, a $1,450,000 punitive damages award would result in a ratio of only 1.45 to 1. There is no principled reason to award a lower amount of punitive damages for harm to Mr. Gray than would be awarded for the same harm, under the same circumstances, to the hypothetical well-employed plaintiff.

In *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) (involving common-law slander of title), the High Court upheld a ratio of 526 to 1 ($10,000,000 punitive damages and $19,000 in compensatory damages). In so doing, it emphasized the egregious nature of the defendant's conduct and the potential harm, in addition to the actual harm found, that its conduct could cause. "[B]oth State Supreme Courts and this Court have eschewed an approach that concentrates entirely on the relationship between actual and punitive damages. It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." *Id.* at 461.

The Supreme Court of Alabama, analyzing this factor in the context of Alabama law, which permits no award of compensatory damages in a wrongful death case, wrote about this factor, "[O]ne could say that it does not apply as a mathematical ratio, but, if one considers the purpose behind this factor, it applies in the sense of proportionality between the punitive-damages award and the harm that was caused or was likely to be caused by the defendants' conduct. Certainly [referring to a previous case], the likelihood of death to a driver of a passenger automobile is great in the case of collision with a tractor-trailer truck fully loaded with logs and weighing approximately 90,000 pounds. Certainly, death is a great harm. . . . The punitive-damage award in this case is not disproportional to the loss of life caused by the defendants' malpractice." *McKowan v. Bentley*, 773 So. 2d 990, 998 (Ala. 1999).

The United States Court of Appeals for the Sixth Circuit upheld, in *Argentine v. United Steelworkers of America*, 287 F.3d 476 (6th Cir. 2002), a ratio of 42.5 to 1. The harm was impairment of the plaintiffs' reputations and free speech rights. The Court noted, citing *Gore*, that the High Court had established no rigid mathematical formula and that ratios may be higher when the harm is particularly egregious but the economic harm is minor.

The Supreme Court of Ohio, in *Wightman v. Consolidated Rail Corp.*, 715 N.E.2d 546 (Ohio 1999), upheld a 6,250 to 1 ratio where the compensatory damages for damage to a car were $2,400 and the punitive damages award, as remitted, was $15,000,000. "A large disparity is allowable because a punitive damages award is more about a defendant's behavior than the plaintiff's loss." *Id.* at 553. "The value of the car Michelle

Wightman was driving has little to do with how a jury might effectively and fairly punish and deter Conrail's conduct regarding the operation of its crossings." *Id.* (In this case the defendant's operation of its crossings had resulted in the death of the daughter of the plaintiff, who received compensatory damages of $2,400.) "A substantial harm, a continuing risk, a deterrent effect, and an economically viable company are factors that make a significant punitive damages award appropriate in this case." *Id.*

In *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003), the Court upheld a ratio of 37 to 1—$186,000 in punitive damages and $5,000 in compensatory damages. The plaintiffs' claim was that the defendant hotel allowed them to be attacked by bedbugs. The Court noted that the U.S. Supreme Court has not mandated 4-to-1 or single-digit ratios and turned to a consideration of why punitive damages are awarded and why the High Court has decided that due process requires that punitive damages awards be limited. *Id.* at 676. Punitive damages are for punishment, and in penal theory, "'the punishment should fit the crime' in the sense of being proportional to the wrongfulness of the defendant's action." This principle is modified when the probability of detection of is very low; for example, there are heavy fines for littering. *Id.* Both of these principles, applied to the present case, support the jury's award of punitive damages, because the focus should be more on the wrongfulness of the conduct than on the compensatory damages awarded (so that the punishment will fit the "crime"), and it was very difficult to detect and prove that the Hospital had engaged in grossly negligent conduct (as evidenced by 14 years of litigation, two-and-a-half hard-fought trials, and two appeals).

The *Mathias* Court went on to note that in cases involving huge economic injuries, the considerations that are necessary when compensatory damages are small fade. *Id.* at 677. "As the Court emphasized in *Campbell*, the fact that the plaintiffs in that case had been awarded very substantial compensatory damages—$1 million for a dispute over insurance coverage—greatly reduced the need for giving them a huge award of punitive damages ($145 million) as well in order to provide an effective remedy." *Id.*

The *Mathias* Court also noted that if punitive damages awards are small in cases where compensatory damages are small, but the defendant's conduct is egregious, the plaintiff may well have difficult financing the lawsuit. While the wealth of a defendant is not a sufficient basis for awarding punitive damages, "wealth in the sense of resources enters [in] in enabling the defendant to mount an extremely aggressive defense . . . and by doing so . . . make litigating against it very costly, which in turn may make it difficult for the plaintiffs to find a lawyer willing to handle their case, involving as it does only modest stakes, for the usual 33-40 percent contingent fee." *Id.*

In the present case, the compensatory damages awarded were small, making the ratio large. The Court's focus in analyzing the proportionality requirement should be on the egregious conduct of the defendant and the necessity of punishing it for the harm and potential harm to Mr. Gray and deterring it, and others, from treating even poor people in a grossly negligent way in the future.

3. Civil Penalties

As for the third *Gore* factor, the comparison of the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct,

EMTALA provides for a $50,000 penalty for each violation of the statute. The Court of Appeals pointed out in its 2013 Opinion that "the existence of civil and criminal penalties has a bearing on the seriousness with which a state views the wrongful action" (2013 Opinion at 26), citing *Campbell*, 538 U.S. at 428, 523 S. Ct. at 1526, and discussed the purpose of EMTALA and the fact that a hospital's violation of EMTALA "may have significant consequences on affected persons beyond mere economic damages. Congress established civil liability and penalties to deter covered hospitals from engaging in conduct which could lead to such consequences." (2013 Opinion at 26-27.)

The difference between the punitive damages award and the civil penalty allowable under EMTALA does not make the punitive damages award unconstitutional. For one thing, it is apparent from the case law that civil money penalties are typically not as high as punitive damages that are upheld. It is instructive to note that in *State Farm*, *supra*, the Court suggested that a punitive damages award of $1,000,000 would have been constitutionally sound, while the comparable civil fund was only $10,000. This means that a punitive damages award that is 100 times greater than a comparable civil penalty can be constitutionally appropriate (whereas in our case the punitive damages are 29 times greater than a $50,000 penalty and 13 times greater than the penalty if it were imposed twice (for conduct on April 8 and again on April 9).

In discussing this issue, the Court of Appeals of New Mexico in *Grassie v. Roswell Hosp. Corp.*, 258 P.3d 1075 (N.M. App. 2010), noted that this criterion "has been criticized as ineffective and very difficult to employ." *Id.* at 1089-90. There is the problem of identifying substantial legislative judgments concerning appropriate sanctions

for the conduct at issue, and there is the danger that a civil penalty may be too low to have a reasonable deterrent effect. *Id.* at 1090. The *Grassie* Court disagreed that the $50,000 penalty provided for by EMTALA provides the best guidance for the appropriate measure of punitive damages, as EMTALA was not designed or intended to serve that purpose. Additionally, the $50,000 penalty is too low to serve as a deterrent. *Id.* The Court of Appeals of Kentucky has indicated its agreement. *Ragland v. DiGiuro*, 352 S.W. 2d 908, 922 (Ky. App. 2010) ("[T]here is reason to believe the third guidepost is the least important of all.").

Furthermore, EMTALA's civil penalty is not the only thing to consider when analyzing this factor. Verdicts in comparable cases may also be considered. *See,e.g., Gibson v. Moskowitz,* 523 F.3d 657, 665 (6th Cir. 2008) (considering awards in other cases in assessing this factor); *Gregory v. Shelby County, Tennessee*, 220 F.3d 433, 445 (6th Cir. 2000) (noting that "the third factor provides little guidance in this determination as the parties have provided no evidence of similar jury verdicts on this issue"); *Fastenal Co. v. Crawford*, 609 F. Supp. 2d 650, 670 (E.D. Ky. 2009) (comparing punitive damage awards in cases similar to it).

There are many cases involving physical harm to the plaintiff or plaintiff's decedent that make it clear that a punitive damages award of $1,450,000 is far from shocking.

The *Gregory* court upheld a $2.2 million dollar punitive damages award to the estate of a man who "suffered severe physical abuse, endured long hours of conscious pain and suffering, and ultimately died as a result of Officer Shearin's actions." *Gregory*,

220 F3d at 445.

The Court of Appeals of Kentucky upheld a punitive damages award of $2,500,000 to a woman who suffered extensive injuries in a car accident. *Nissan Motor Co., Ltd v. Maddox*, 2012-CA-000952-MR (Ky. App. 2013).

In *Gibson v. Moskowitz*, 523 F.3d 657 (6th Cir. 2008), the Sixth Circuit upheld a $3,000,000 punitive damages award to the estate of a mentally impaired man who suffered for several days and died due to the defendant's deliberate indifference and medical malpractice.

In *Arnold v. Wilder*, 657 F.3d 353 (6th Cir. 2011), a wrongful arrest case involving bruises and no permanent injuries, the jury awarded $1,000,000 in punitive damages. The trial court reduced that award to $229,600. The Sixth Circuit agreed that remittitur was appropriate but (stating that the trial court "erred in mechanically applying a four to one ratio") increased the award to $550,000. *Arnold*, 657 F.3d at 372.

In a medical malpractice case, the Supreme Court of Alabama wrote, in analyzing this factor and upholding a $2,000,000 punitive damages award to the estate of a woman who died from mismanagement of an infection, that the award was "not an unusually large amount in comparison with awards affirmed in other wrongful-death cases this Court has reviewed." *McKowan v. Bentley*, 773 So. 2d 990, 999 (Ala. 1999). A concurring justice wrote, "[A]n award of $2 million no longer shocks my conscience." *Id.* at 1001 (concurring opinion).

In *Century Surety Co. v. Polisso*, 139 Cal. App. 4th 922 (2006), the court upheld a $2,015,000 punitive damages award to a married couple who had suffered emotional

distress, heart palpitations, depression, panic attacks, sleep loss, loss of hair, and post traumatic stress disorder due to an insurance company's bad faith dealings with them. *Polisso*, 139 Cal. App. 4th at 963-64.

In *Turley v. ISG Lackawanna, Inc.*, No. 13-561 (2d Cir. 2014), the jury awarded $24,000,000 in punitive damages to a man who had experienced racial harassment at work, with resultant psychological harm, over a period of several years. The district court remitted that amount to $5,000,000. The United States Court of Appeals for the Second Circuit felt that that amount was still constitutionally excessive and remanded for a remittitur to $2,640,000.

In *In re: Actos (Pioglitazone) Products Liability Litigation*, No. 6:12-cv-00064-RFD-PJH (W.D. La., October 27, 2014), the court wrote a long, thoughtful opinion summarizing all of the United States Supreme's Court cases on the constitutionality of punitive damages awards, and ultimately substantially reduced to $36,875,000 the jury's punitive damages award to a man whose harms included bladder cancer, an increased risk of recurrence, and possible premature death due to the pharmaceutical companies' conduct.

Because conduct such as that of the Hospital is taken so seriously that Congress enacted legislation—EMTALA—to try to prevent it, and because published punitive damages awards make it apparent that an award of $1,450,000 for serious personal harm or death is well within the norm, the civil penalties factor also favors upholding the punitive damages award in the present case.

CONCLUSION

Larry Thomas, as administrator of the estate of James Milford Gray, respectfully requests this Court to affirm the Opinion of the Court of Appeals.

Respectfully submitted,

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